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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2024

ROBERT WARTH, *et al.*,

Petitioners,

vs.

IRA SELDIN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus Curiae*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to black persons suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on

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* Letters of consent from counsel to the filing of this brief for the petitioners and the respondents have been filed with the Clerk of the Court.

their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

The Legal Defense Fund receives many requests for assistance in the enforcement of fair housing laws, and participates in many cases in both federal and state forums to advance the national policy of "fair housing throughout the United States," 42 U.S.C. § 3601. Our experience indicates that discrimination in housing transactions necessarily causes injury to a wide circle of persons, including potential renters or purchasers, other residents of the building or neighborhood, builders, and owners. Adequate enforcement of fair housing requires that a commensurately broad range of persons and organizations be entitled to commence administrative and judicial proceedings. The Legal Defense Fund is therefore interested that requirements in fair housing cases not be more onerous than in other areas of law, lest victims of racial exclusionary zoning and other discriminatory housing practices be deprived of access to the judicial forum. Moreover, in our experience, fair housing cases can only be successfully litigated with advance preparation and the ability to devote the time, effort and expense necessary to prosecute complaints. Often "the only effective adversary", *Barrows* v. *Jackson,* 346 U.S. 249, 259 (1953), with sufficient resources and independence to challenge exclusionary zoning may be a membership association suing in behalf of injured members.

I.

The Denial of Standing to Challenge Exclusionary Zoning to Excluded Minorities Would Frustrate Achievement of Fair Housing Throughout the United States.

As this Court has said, the Constitution "nullifies sophisticated as well as simple minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 269, 275 (1939).[1] At issue in this case is whether a town can escape the scrutiny of a federal court that would result if it enacted an ordinance that explicitly excluded blacks and other minorities,[2] by enacting and administering a zoning scheme racially neutral on its face that nevertheless had the same purpose and effect.[3] The Court of Appeals in this case, by erecting rules of standing more stringent than those that govern in other areas of the law, has effectively insulated the Town of Penfield from a challenge to its policies.

The Second Circuit held, in essence, that poor black and other minority persons who allege that they are prevented by the policies of the defendants from renting or purchasing housing cannot maintain this action; rather, their only apparent remedy is to wait and hope that other persons, specifically potential home-builders, will bring suit. Completely overlooked by the Court below is the fact that the interests and goals of a construction firm may be quite different from those of a potential black renter or purchaser. Also overlooked is the fact that in another case where a home-builder was the sole plaintiff there might be a question as to his standing in an action seeking to overturn a decision not to grant him a permit, to rely solely

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[1] See also, *Smith* v. *Texas,* 311 U.S. 128, 132 (1940).

[2] *Buchanan* v. *Warley,* 245 U.S. 60 (1917).

[3] See, *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

on the ground that the reason for the denial was to deprive third parties, *i.e.*, blacks and minorities, of their constitutional rights. *Compare, Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), *with, Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) and *Barrows* v. *Jackson*, 346 U.S. 249 (1953). Thus, the net result of the decision might be that no one could challenge policies that clearly violate the Constitution, a result that this Court has often refused to sanction. See, *e.g., Roe* v. *Wade*, 410 U.S. 113, 125 (1972).

Amicus urges that the decision of the court below, therefore, is inconsistent with the goal of enforcing the national policy of "fair housing throughout the United States," 42 U.S.C. § 3601,[4] by making it impossible for those ultimately injured by exclusionary zoning policies to challenge them. The discriminatory impact of racial zoning has been recognized at least since *Buchanan* v. *Warley*, 245 U.S. 60 (1917). See also, *Harmon* v. *Tyler*, 273 U.S. 668 (1927); *Richmond* v. *Deans*, 281 U.S. 704 (1930); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 6 (1974). Notwithstanding applicable Reconstruction amendments and laws, and long-standing judicial precedent, exclusionary zoning practices such as lot size, restrictions on multi-family structures, density limitations, and discriminatory grant of variances persist as barriers to racial integration of metropolitan areas across the nation. Indeed, the United States Commission on Civil Rights has recently documented that exclusionary zoning by local authorities is a principal factor in maintaining dual housing markets in metropolitan areas

[4] The Housing and Community Development Act of 1974, Pub. L. No. 93-383, also affirms as an aim, "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the neutralization of deteriorating or deteriorated neighborhoods to attract persons of higher income."

in which the black and the poor are restricted to decaying central cities surrounded by closed white, affluent suburban communities. *Equal Opportunity in Suburbia*, 29-35 (July 1974).[5]

Racial zoning is a particularly pernicious form of housing discrimination in that its effect is wholesale exclusion.

> This is not a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell to whomsoever he please, excluding all others whether they be Negro, Chinese, Japanese, Russians, Catholics, Baptist, or those with blue eyes. We deal here with a problem in the realm of zoning . . . whereby a neighborhood is kept "white" or "Caucasian" as the dominant interests desire. *Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967) (Justice Douglas concurring).

Exclusionary zoning can also have the effect of facilitating discrimination in the provision of public schools, see, *e.g., Milliken* v. *Bradley*, —— U.S. ——, 41 L.Ed. 2d 1069 (1974), municipal services, see *e.g., Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *affirmed en banc*, 461 F.2d 1171 (5th Cir. 1972), and in the exercise of other civil rights, see, *e.g., Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), by efficiently creating racially distinct neighborhoods and communities. It would be anomalous, therefore, if those persons with the greatest interest in the eradication of exclusionary policies cannot challenge them because of artificially strict standing requirements.

[5] In the Rochester metropolitan area, for instance, the black population in 1970 was 49,647 in Rochester and 2,571, in suburban towns, as compared to total population figures of 296,233 in Rochester and 415,684 in the suburbs. The black population of suburban Penfield is 60 out of a total population of 23,782. Appendix on Appeal 228-29. [hereinafter "Appeal App."]

II.

Individual Black and Spanish-Surnamed Plaintiffs, Housing Council in the Monroe County Area, and Rochester Home Builders Association Have Standing to Challenge the Penfield Zoning Ordinance.

The issue in this case is whether *any* of the plaintiffs or the intervenor has made allegations adequate to confer standing to challenge the Penfield zoning ordinance as enacted and administered.[6] In affirming the motion to dismiss, the Second Circuit disregraded express allegations and averments in the record of "threatened or actual injury resulting from the putatively illegal action," *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973), that establish "a logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). The rule is that, "federal plaintiffs must *allege* some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (emphasis added) *Linda R.S.* v. *Richard D., supra*, 410 U.S. at 617.

The Second Circuit, however, misconstrued this standard and premised dismissal on the judgment that none of the individuals or associations "has suffered from any of the specific, overt acts alleged," *i.e.* that the allegations of injury were in fact untrue. In so deciding, the Court of Appeals failed to make the distinction explicitly recognized by this Court in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) and in *United States* v. *SCRAP*, 412 U.S. 669 (1974), between the allegations of the complaint and what may be proved in the trial on the merits.[7]

[6] Because standing is clear as to certain individuals and associations, this *amicus* brief will not discuss the standing of all of them. See, *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 44-45 (1974).

The complaint specifically alleges that the black and Spanish-surnamed class action plaintiffs are deprived of fair housing opportunities in Penfield on account of race and poverty by the operation of the zoning ordinance. Looking at the allegations as a whole (rather than by each plaintiff separately, as did the court below), the minority plaintiffs seek to show that: (1) the exclusionary zoning scheme was adopted and administered to exclude minorities; (2) it in fact has succeeded in its purpose; (3) as part of this scheme permit requests for low-income multiple housing have been denied; (4) the named plaintiffs are black, Spanish-surnamed, low-income persons who wish to live in the town; and (5) they have been unable to do so because of the success of the exclusionary zoning scheme.[8] If plaintiffs prevail on the merits, the black

[7] "We deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected. If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of Sierra Club to seek review." *United States* v. *SCRAP*, 412 U.S. at 689-90.

[8] The complaint states:

> FOURTEENTH: That the statute as enacted and/or administered by the defendants, has as its purpose and in fact, effects and propagates exclusionary zoning in said Town with respect to excluding moderate and low income multiple housing and further tends to exclude low income and moderate income and non-white residency in said Town and thereby deprives persons and has deprived persons including the plaintiffs Harris, Ortiz, Broadnax, Reyes and Sinkler of the

and Spanish-surnamed plaintiffs will personally benefit by achieving the same right to rent or purchase property in Penfield presently possessed by white persons, but denied the class of racial minorities by the present ordinance. See *James* v. *Valtierra*, 402 U.S. 137 (1971). Thus, here the individual minority-group plaintiffs have alleged a direct relationship between the correction of the injury suffered (exclusion from the town), and the relief sought (ending of the scheme of evclusionary zoning).[9]

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same right to inherit, purchase, lease, sell and/or convey real property and to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property as are enjoyed by persons presently living in said Town. Appeal App. at 9.

Similar allegations are made in paragraphs Sixteenth, Appeal App. at 9-10; Seventeenth, Appeal App. at 10-11; Eighteenth, Appeal App. at 11-12; Nineteenth, Appeal App. at 12-13; and Twentieth, Appeal App. at 13-14. More particularly, the complaint alleges that Mr. Ortiz, a Puerto Rican, "is denied certain rights by virtue of his race." and that Mr. Ortiz "is employed in the Town of Penfield, New York, but has been excluded from living near his employment as he would desire by virtue of the illegal, unconstitutional and exclusionary practices." Appeal App. at 6. Mr. Ortiz subsequently filed an affidavit that avers in detail the deprivation on account of race and poverty alleged, Appeal App. at 188-202. Affidavits were also submitted in behalf of similar allegations of injury to Ms. Broadnax, a black person, Appeal App. at 203-09; Ms. Reyes, a Puerto Rican, Appeal App. at 210-14; and Ms. Sinkler, a black person, Appeal App. at 215-23.

[9] This Court, in other contexts, has noted that the effect of a zoning ordinance on certain property is at times indirect, without suggesting any difficulty with standing. "[A] zoning ordinance usually has an impact on the nature of the property which it regulates . . ., [even though] the precise impact on value may, at the threshold of litigation over validity not yet be known." *Belle Terre* v. *Boraas, supra*, 416 U.S. at 9-10; *Berman* v. *Parker*, 348 U.S. 26, 36 (1954); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 397 (1926). The effect of the Penfield zoning ordinance on certain excluded persons should be similarly treated.

Moreover, it has long been recognized that a black person need not be physically denied admission to segregated facilities before he may challenge racial discrimination. See, *e.g.*, *Cypress* v. *Newport News G. & N. Hosp. Ass'n*, 375 F.2d 648 (5th Cir. 1967).

The standing of these class action plaintiffs who seek to dismantle the existing dual housing market which excludes them from living in the Penfield suburb is exactly the standing possessed by school desegregation plaintiffs who seek to disestablish dual school systems. See, *e.g.*, *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965). Indeed, allegations of less traditionally cognizable forms of personal injury have been held to confer standing adequate to survive a motion to dismiss. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972). The allegations of personal injury in *United States* v. *SCRAP*, 412 U.S. 669 (1974), although "far less direct and perceptible" than in *Sierra Club* were held adequate.

With regard to the organizational plaintiffs, this Court has held that, "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, e.g., *NAACP* v. *Button*, 371 U.S. 415, 428," *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972).[10] That associations may enforce rights in behalf of their members is a well established principle of standing law in civil rights litigation,[11] and this Court has long

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[10] See also, *United States* v. *SCRAP*, 412 U.S. 669, 683-90 (1973); *Allee* v. *Medrano*, —— U.S. ——, 40 L.Ed. 2d 566, 582 n. 13, 588-89 (1974); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 153-54 (1951) (Justice Frankfurter concurring); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925).

[11] See *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958); *Bates* v. *Little Rock*, 361 U.S. 516, 523 n. 9 (1960); *Louisiana* v. *NAACP*, 366 U.S. 293, 296 (1961); *NAACP* v. *Button*, 371 U.S. 415, 428 (1963).

recognized that the difficult task of enforcing fair housing guarantees in particular requires application of realistic standing requirements.[12] Moreover, membership organizations have played a significant role in fair housing enforcement in the lower federal courts.[13]

Housing Council in the Monroe County Area, an association of various groups concerned with fair housing in the Rochester metropolitan area, alleges that, "Housing Council's claim in this action arose out of the same transactions and occurrences, and raises the same questions of law and fact, as are already before this Court." Appeal App. at 83. Housing Council, in the affidavit of its executive director filed with Motion and Notice of Motion, specifically avers that the Penfield zoning ordinance has resulted in injury to an identified member group.[14] Simi-

[12] *Buchanan* v. *Warley*, 245 U.S. 60, 72-73 (1917); *Barrows* v. *Jackson*, 346 U.S. 249, 254-59 (1953); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237 (1969); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[13] See, *e.g.*, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Southern Alameda Span. Sp. Organ.* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Kennedy Park Homes Assoc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *United Farm Workers of Florida Housing Proj., Inc.* v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); *Sisters of Prov. of St. Mary Woods* v. *City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); *Blackshear Residents Organ.* v. *H.A. of City of Austin*, 347 F. Supp. 1138 (W.D. Texas 1971).

[14] Upon information and belief, at least one such [charter member] group, viz. Penfield Better Homes Corporation, is and has been actively attempting to develop moderate income housing in the Town of Penfield, but has been stymied by its inability to secure the necessary approvals from the defendants in this action. Appeal App. at 91.

Similarly, the affidavit of Ann McNabb, a director of Penfield Better Homes, set forth actual terms of an application of Penfield Better Homes to build "a complex of cooperative housing

larly, intervenor Rochester Home Builders Association, a construction industry association, specifically alleges in its complaint that the Penfield zoning ordinance has injured its members by prohibiting them from "constructing and offering for sale or rental, housing to all segments of the community which require housing, particularly those persons of low and moderate income." Appeal App. at 80-81. Further, it is alleged that the members of the association, who have been responsible for constructing 80% of the private housing units in Penfield in the last 15 years, have been injured in the sum of $750,000 by reason of the challenged ordinance and its administration.

In short, the Housing Council and Rochester Home Builders alleged no less than did the NAACP in *NAACP* v. *Button*, *supra*, 371 U.S. at 428; Students Challenging Regulatory Agency Procedures, the Environmental Defense Fund, the National Parks and Conservation Association, and the Izaak Walton League of America in *United States* v. *SCRAP*, 412 U.S. at 678-80; or the United Farm Workers Organizing Committee in *Allee* v. *Medrano*, *supra*, 40 L.Ed. 2d at 582 n. 13. Thus, the decision of the Court of Appeals denying them standing is in conflict with the decisions of this Court and should be reversed.

units which would be sold to persons earning approximately $5,000.00 to $8,000.00 a year" and facts concerning the refusal to rezone by Penfield Planning Board and Town Board. Appeal App. at 311-13, 423-51. The affidavit of Housing Council's executive director also avers that, "The large majority of the charter member groups themselves have membership which is made up primarily of low and moderate income whites and non-whites and therefore directly represent the interests of such people." Appeal App. at 92.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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